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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-608

LOUIS NIZER, DOUBLEDAY & CO., INC.
and FAWCETT PUBLICATIONS, INC.,

Petitioners,

v.

MICHAEL MEEROPOL and ROBERT MEEROPOL,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR MICHAEL MEEROPOL AND ROBERT MEEROPOL IN OPPOSITION

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Opinions Below

The opinion of the District Court is reported at 417 F.Supp. 1201 (S.D.N.Y. 1976). The opinion of the Court of Appeals is reported at 560 F.2d 1061 (2d Cir. 1977).

Question Presented

Whether the Court of Appeals correctly found that the district court erred as a matter of law and as a matter of fact in granting the petitioners' motion for summary judgment, and correctly found that there were disputed

issues of fact bearing upon the issues and applicability of the defense of fair use requiring the remanding the matter to the district court for further proceedings and trial.

Statement of the Case

In June, 1973, respondents Michael and Robert Meeropol, sons of Ethel and Julius Rosenberg, instituted an action in the United States District Court for the Southern District of New York. Count I of the complaint seeks damages and injunctive relief for statutory copyright infringement under 17 U.S.C. §101. The Meeropols are the owners of copyrighted letters written by their parents Rosenberg while incarcerated, which were first published in June 1953 under copyright in a book, DEATH HOUSE LETTERS OF ETHEL AND JULIUS ROSENBERG. The complaint alleges that petitioners Nizer, Doubleday and Fawcett infringed upon and unlawfully appropriated the Meeropols' copyrighted letters by incorporating in the petitioners' book, THE IMPLOSION CONSPIRACY, substantial verbatim portions of those letters without authorization. The Meeropols allege that the wrongfully appropriated letters were misused and distorted by the petitioners and were exploited by the petitioners as a means of seeking to authenticate, promote and sell their book. (A1-8, 18-29, 55-68)*

Petitioners' answers to the complaint, essentially identical, acknowledged the verbatim copying of the copyrighted letters, but asserted, *inter alia*, the defense of "fair use". (A32-33, 39-41, 47) No claim or defense of

* References to the appendix on appeal to the Second Circuit are prefaced with the letter "A" followed by the page number (e.g., A-1-28).

privilege under the First Amendment was pleaded by any of the petitioners to this count of the complaint.

As a result of stays issued by the district court from almost the very inception of the action, the Meeropols' depositions were only at their initial stages when the petitioners moved by summary judgment to dismiss the statutory copyright count on January 30, 1975. (A207-237)

The motion for summary judgment came before Judge Gagliardi in May 1975. The Meeropols submitted numerous affidavits in opposition, noting the multitude of disputed issues of fact which were raised which could only be resolved by a trial before a court and jury. (A250-506, 553-606)

The decision granting petitioners' motion for a summary judgment was rendered on July 20, 1976. (A651-683) Final judgment was entered on July 23, 1976 (A684), and respondents appealed.*

The Court of Appeals reversed the grant of summary judgment on the statutory copyright claim and remanded the matter for further proceedings and trial of all of the factual issues. The Court stated:

> "We think fair use not established as a matter of law, and that genuine issues of fact exist precluding the grant of summary judgment for defendants." (Pet. Appendix A15.)

The Copyrighted Letters

The Rosenbergs during the period of incarceration wrote numerous letters to each other, their children and attorneys

* Count II of the complaint for defamation and invasion of privacy were dismissed by the district court on motion for summary judgment, 381 F.Supp. 29 (S.D.N.Y. 1974) The dismissal was affirmed by the Court of Appeals and is not the subject of the present petition.

which were published under copyright in June of 1953 for the express purpose of using the proceeds to support their children, the respondents herein, during their minorities and for their education. (A2-7, 254) During the years 1953 to 1956 THE DEATH HOUSE LETTERS were published in the United States and in numerous countries throughout the world, the sale and distribution numbering in the hundreds of thousands. They were appreciated and esteemed for their content and their high literary value. (A255-259) The letters constituted the respondents' inheritance from their parents, which they preserved with the specific intent of republishing portions of them at such times as they deemed appropriate (Document 3, Record on Appeal).

All of the petitioners have acknowledged their awareness of the fact that the Rosenberg letters were copyrighted and that they were fully on notice of that fact prior to the infringement. Indeed, Doubleday, who had published a previous book on the Rosenberg case, INVITATION TO AN INQUEST, refused to permit the authors of that book to include respondents' letters until they had received full written authority from the copyright owners.* (A19-29, 64-67, 82-83, 558-559, 568-570)

The Infringing Work

The infringing work, THE IMPLOSION CONSPIRACY, had its genesis in a television script written by Nizer and thereafter converted into the book published by Doubleday and Fawcett. Notwithstanding the representations of the petitioners to the contrary, approximately 70% of the book

* While petitioners appropriated the copyrighted letters without authorization or consent from respondents, strangely the petitioners obtained the consent of the Bernard Shaw Estate for publishing a quote from ST. JOAN—but that quote was in a copyrighted letter of Ethel Rosenberg which the petitioners opted to infringe upon.

related to Nizer's semi-fictionalized, inaccurate version of the Rosenberg trial and post-trial legal proceedings. In the last 125 pages of the book one finds all of the copyrighted letters misleadingly interlaced with false and fictitious descriptions of dialogue and events involving the Meeropols and their parents. It is obvious that the petitioners appropriated the copyrighted letters and prominently featured them for commercial exploitation seeking to capitalize on the unique intellectual and literary product of the respondents' parents. This was made evident in the promotional material utilized by the petitioners in its advertising of the infringing work.*

The Opinion of the Court of Appeals

The Court of Appeals, after noting that the application of "fair use" was among "the most troublesome in the whole law of copyright" in a metaphysical area of the law, concluded that it "depends on an examination of the facts in each case", rather than "resort to arbitrary rules or fixed criteria".

* The dust jacket of the book states:

"... the love story of Ethel and Julius and expressed in love letters between them while in the death house." (A255)

In advertisements, and in the press, radio and television the letters are prominently referred to, and quoted by Nizer and others:

"... profound love between Ethel and Julius—as expressed in their death row correspondence..." (A255)

"Enormous drama ... the extraordinary passion of their letters to each other ..." (A256)

"They [Rosenbergs] expressed their longing by writing love letters. I quote generously from them in the book... eloquence ... lyrical passion would be worthy of a great poet. I will not quote more of their letters here. The book does." (A256)

"The love letters she wrote were published while she was in jail. They were moving documents. Somehow or other people who face death become very eloquent. (A255)

In reviewing the record below, the Court found that the district court erred in ignoring the genuine relevant issues of fact or in refusing to recognize that there were material issues of fact which could only be resolved by trial, and it was on these fact resolutions that the ultimate questions of law could be correctly decided.

Unlike *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), cert. den., 385 U.S. 1009 (1967), the Court of Appeals held the present case involves the verbatim copying of substantial portions of the copyrighted letters written by the subjects, the Rosenbergs.*

The Court of Appeals set forth some of the factual issues which would have to be resolved on the trial of the action, issues which *"must be evaluated in concert"* and which can not be resolved by summary judgment:

> Whether the Rosenberg letters were used for scholarly historical reasons, or predominantly for commercial exploitation;
>
> The purpose and character and quality of the use of the copyrighted material in the infringing work, as well as the nature of the copyrighted work;
>
> The necessity of the verbatim copying of the letters;
>
> The amount taken and substantiality of the use in the work involved, as well as its effect upon the potential market of the copyrighted material;
>
> Whether the petitioners' work tends to diminish or prejudice the potential sale of the copyrighted work;

* In addition to the verbatim copying of 28 copyrighted letters, the Court noted that the petitioners copied two additional letters containing 1,058 words published in the copyrighted British edition of THE DEATH HOUSE LETTERS.

> The market for republication or for sale of motion picture rights, and the affect of the infringement thereon.

The Court found, as even the district court had acknowledged, that the qualitative impact of the material copied and infringed upon was a subjective and factual issue which could only be resolved by the presentation of all the evidence at a trial; and that the district court had erred in finding as a matter of fact and law that the infringement and appropriation of the respondents' copyrighted letters was insubstantial.

The Court further quoted approvingly from *Folsom* v. *Marsh*, 9 F.Cas. 342 (C.C.D. Mass. 1841) (No. 4901), to the effect that the court has been explicit in affording copyright protection for personal letters of historical figures and that, further, the infringing of the same by including them as a distinct and integral part of another work would constitute a clear case of piracy; and the district court was in error in concluding as a matter of law on the basis of *Folsom* v. *Marsh* that the taking in this case was insubstantial.

The Court of Appeals cited the most recent decision of this Court bearing upon the need and the right to protect copyrighted property in the face of a First Amendment claim. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, —— U.S. ——, 97 S.Ct. 2849, 53 L.Ed. 2d 965 (1977) at pp. 2856, 2857.

The Court of Appeals found that "the letters were prominently featured in promotional material for the book" and that the letters were quoted out of context and altered, thus raising the serious factual issue of the claimed "necessity for the verbatim quotations for the sake of historical accuracy".

The Court held that the respondents were entitled to introduce evidence on the issues of the purpose of the use and the damages caused by the infringement, all as part of the ultimate determinations of fact and law which could only be made after a trial. In this regard the Court in a concluding footnote set forth in brief fashion some of the many issues of fact to be resolved upon the remand and trial:

> "14. The purpose for which the letters were included in the book, whether the book is bought because it contains the Rosenberg letters, the necessity for verbatim copying of the letters, and the effect of the use of the copyrighted letters on their future market *are among the relevant factors which may be considered* before there can be a decision as to the availability of the fair use defense to appellees." (emphasis supplied)

ARGUMENT

The sole question presented by the petitioners is whether the Court of Appeals correctly concluded, that the motion for summary judgment to dismiss the copyright statutory count raised material and relevant issues of fact which required a trial before a court and jury. The petitioners do not claim that the Court of Appeals misstated the law applicable to a defense of "fair use" in a copyright case. Petitioners argue that (pet. p.17) the Court of Appeals should have applied other undefined rules rather than resolve the question "by the mere application of the traditional defense of fair use".

Petitioners offer none of the grounds warranting granting certiorari as defined by Rule 19 of this Court. The decision of the Court of Appeals is not in conflict with the

decisions of other courts of appeals; it did not decide an important question of federal law which had not previously been resolved by this Court; nor was the decision of the Court of Appeals in conflict with the applicable decisions of this Court.

The application of any fair use defense requires resolution of a host of crucial underlying fact issues, and thus summary judgment can never be granted where there is a dispute of any material facts. It is only after trial and resolution of facts and judgment that meaningful appellate review should be had. Thus petitioners' present application for certiorari is totally premature and at best constitutes a request for an advisory opinion by this Court on speculative and disputed issues of fact.

The issue which the petitioners are seeking to pose before this Court is not of the specifically delimited kind subject to generalized interpretation and applicable in the absence of particular facts such as whether shares of stock in a cooperative state sponsored non-profit housing cooperative is a "security" under the provisions of the Securities Act of 1933. *See, United Housing Foundation* v. *Forman,* 419 U.S. 1120 and 421 U.S. 837 (1975).

The Court of Appeals Correctly Vacated the Order Granting Summary Judgment and Remanding the Matter for Trial.

The Court of Appeals clearly articulated the principal elements underlying the defense of fair use and clearly delineated some of the many issues of fact which had to be considered and resolved by trial in this case before there could be any ultimate decision and determination of the availability of the fair use defense to the petitioners.

The defense of fair use cannot be determined on the basis of mathematical formula or "arbitrary rules and fixed cri-

teria". Thus the petitioners' persistence in dividing the number of words stolen into the total number of words in the copyrighted property or the infringing work, does not meet or resolve the "difficult and complex issues" posed in this case. (Appendix A14, pet.) The Court of Appeals meticulously examined the legal and factual premises upon the which the district court rendered its decision. The Court of Appeals clearly analyzed and defined the errors found in the district court opinion and then set forth the guidelines and areas of proof which must be dealt with upon the trial of the action.

The petitioners have chosen to avoid and almost totally disregard the decision of the Court of Appeals and to misread or misstate it Such is the only explanation for the petitioners' claim that the Court of Appeals did not disagree with the district court regarding the substantiality of the infringement. (pet. 21) The Court of Appeals at length itemized the very specific factual issues necessary for a determination of whether there was a substantial use of the copyrighted material. The petitioners argue that the district court was correct in finding that no damage resulted from the unlawful appropriation of the respondents' property. But both the district court and the Court of Appeals found that the respondents might well be able to prove substantial damages, but the Court of Appeals held the district court erred in arrogating to itself that issue in the absence of a trial.

The petitioners ignore the Court of Appeals' holding and premise their present application, as if a trial had been held—the trial they seek by all means to avoid. Only then will they then be confronted with the reality of meeting their burden of proof in seeking to establish the defense of fair use.

Petitioners' First Amendment Argument Is Contrived, Lacking Substance and Merit.

The petitioners argue that this Court should grant certiorari on the vague "question of the relationship between the First Amendment and the Copyright Laws". Just what the particular question is, is never defined. Nor is it explained how such a "question" was dealt with or disposed of by the Court of Appeals. In effect the petitioners argue that an infringer who pirates copyrighted writings should be immune from liability or trial, if the infringing work touches upon a subject of topical or historical interest.

The petitioners in their answer to the copyright count, neither pleaded nor raised any First Amendment defense or privilege (A30-50). In their brief to the Court of Appeals, the petitioners argued that the First Amendment requires a "liberal application of the fair use defense". The argument so lacked merit as to not warrant any comment or response by the Court of Appeals in its opinion.

The petitioners now argue that applying the well-recognized principles of a fair use defense will prevent them from writing a book supportive of the Rosenberg trial and conviction or express their opposition to capital punishment. To clearly state the petitioners' position is its most effective refutation. Nizer and his associates are in effect contending that they have the right to take and use copyrighted Rosenberg letters and that this Court should, on petitioners' motion for summary judgment, "carve out a new area of immunity for public interest writing", (pet. p. 18) and on those grounds reverse the Court of Appeals.

The authorities cited by the petitioners afford them no support. In *Wainwright Sec.* v. *Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), the Court conjectured

that in some appropriate case in the future the issue of reconciliation of copyrighted news reports, First Amendment rights and the Copyright Law, could raise some provocative questions, but, dealing with the case before it stated:

> "It is important to differentiate between the substance of the information contained in the report, i.e., the evidence itself, and 'the particular form or collocation of words in which the writer has communicated it' . . . What is protected is the manner of expression . . . the way he structures his material and marshals facts, his choice of words . . ." (pp. 95, 96)

In language particularly applicable to the petitioners, the Court differentiated between "a true scholar and a chiseler who infringes a work for personal profit". The Court then characterized the infringing defendant's conduct ". . . there is no other way to describe it, chiseling for personal profit." It applies with equal force here. The petitioners' attempt to invoke *Rosemont Enterprises, Inc.* v. *Random House, Inc., supra,* in support of their position does not require extensive comment. The Court of Appeals addressed itself to that case and distinguished it from the present one. (Pet. Appendix A15-16)

Equally mistaken is petitioners' reliance on Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?* 17 U.C.L.A.L.Rev. 1880 (1970). The excerpt cited by petitioners (at p. 1197, not p. 1185) applying to graphic works does not apply to the present case, the verbatim copying of writing, the "form of expression". The Nimmer article fully supports the respondents' position in the present litigation. And see also: 2 Nimmer, *The Law of Copyright,* at pp. 145, 646, 649. In *Time, Inc.* v. *Bernard Geis Associates,* 293 F.Supp. 130

(S.D.N.Y. 1968), it was the graphic work, not the form of verbal expression which was at issue.

Respondents are fully appreciative of the importance of the First Amendment, but petitioners' false claim that a trial of the copyright count will have a "chilling effect" which must be rejected.

Pages 7 Through 12 of the Petition Should Be Stricken as False, Scurrilous and Scandalous.

Petitioners falsely claim that the respondents instituted the present action, not on the merits and to seek relief, but to "overturn the conviction of their parents", to vilify the trial judge, to raise money for this political campaign; and further to suppress by means of the Copyright Laws books that conclude the Rosenbergs received a fair trial.

At the inception of this action, the respondents submitted an affidavit which categorically stated:

> "We understand the question of our parents' innocence is not to be litigated in this proceeding." (Document 3, Record on Appeal)

The false claims were also repeated in the Berger affidavit of October 9, 1974 (Document 85[a], Record on Appeal). On respondents' motion, that affidavit and its exhibits were stricken by order of Judge Tyler.

The same false claim was repeated in the October 5, 1976 affidavit of George Berger in the Court of Appeals. Michael Meeropol then replied by affidavit:

> "We totally and categorically reject the assertion of bad faith as the most base form of slander. Obviously this charge is a diversion . . . We initiated this action

because our personal property had been appropriated without permission and soiled and misused in Mr. Nizer's book, *The Implosion Consviracy.*"

And further,

"... Mr. Berger's statement is a lie as he well knows. At no time have my brother and I *ever* used the instant litigation to raise money for our political efforts. We have engaged in fund raising for this lawsuit—and there is nothing illegal or improper about that. However, the overwhelming portion of the expenses of the instant litigation have been borne by our own personal finances."

The same false issues were raised by petitioners in their brief (pp. 21-25), but the Court of Appeals, obviously, found no merit to the contention and completely ignored them.

Respondents have undertaken the present action to protect their inheritance, the letters of their parents, from misappropriation and misuse by the petitioners.* That is the action they brought; those are the issues they wish to press and litigate to a successful conclusion.

The petitioners' claim that the present action was instituted for the "ulterior motive" to suppress books hostile

* Petitioners refer to a portion of the district court opinion directed to the many affidavits submitted by respondents in opposition to the motion for summary judgment. They were tendered to refute petitioners' contention that the infringement should be sanctioned because the Nizer book was a scholarly work valuable to future historians and students. (See district court opinion of July 18, 1973, A107, 112-113; and petitioners' motion for summary judgment, A217-218).

to respondents' parents or supportive of the judgment of conviction is equally false and scurrilous.*

When the respondents learned of the petitioners' infringement of their parents' copyrighted letters, they immediately called upon the petitioners, by letters dated May 10, 1973 (A19-29) to delete the copyrighted letters from the book; to stop using the letters in the advertising and promotion of the book; and to stop falsely holding themselves out as the owners or possessors of the letters with authority to publish them. There were then only about 15,000 unsold copies of the book, and the paperback edition had yet to be issued. The petitioners were not proscribed from fully and completely expressing their views about the fairness of the Rosenberg trial, the verdict, and the sentences imposed and publish the book absent the copyrighted letters.

On December 7, 1973, four months prior to the publication of the paperback edition of THE IMPLOSION CONSPIRACY, the respondents wrote to Fawcett enclosing copies of the letters of May 10, 1973, telling them to delete and not publish the copyrighted letters. Fawcett never responded, published the book with the copyrighted letters and relied upon them in promoting the sale of the book. (A64-67, 82-83)

Petitioners' claim that the institution of the present action was part of a plan to vilify the trial judge and institute a congressional investigation of his conduct is likewise false, scurrilous and scandalous and refuted by the facts. At the time when this action commenced in June

* We need not burden this Court with the list of the many books supportive of the Rosenberg-Sobell trial, verdict and the sentences meted out. To mention a few, see: S. Andhil Feinberg, THE ROSENBERG CASE; J. Edgar Hoover, MASTERS OF DECEIT; Alan Moorehead, THE TRAITORS; Oliver Pilat, THE ATOM SPIES.

of 1973, the respondents were not even contemplating a FOIA action, nor were they aware of the contents of the FBI files and what they would disclose. They started this action in the Southern District of New York, within the Second Circuit where Judge Kaufman is the Chief Judge. As residents of Massachusetts respondents, had they knowledge of the contents of the FBI files as they bear upon the trial judge's conduct, they would have commenced the action elsewhere. The FOIA action was commenced in July 1975, and the relevant FBI files were not found until May or June 1976, a short time prior to Judge Gagliardi's decision dismissing the copyright count of the complaint.

The motion made by the respondents to transfer the appeal to another circuit or to designate circuit court judges from outside the second circuit to hear the appeal was a good, reasoned and well founded motion which the respondents were compelled to make in order to avoid the danger of bias and prejudice in the appeal then pending. The motion was denied, and an application was made to Circuit Justice Marshall, who denied the application on the ground that he had no authority to grant the relief sought.

In denying respondents' motion for a transfer, the panel hearing the motion opined that "the motion here is in effect seeking to retry or exploit issues of the Rosenberg case rather than direct itself to the issues before us". We submit that the court was in error. The respondents submitted a substantial meritorious brief directed to the issues on appeal and were at least successful on the copyright appeal aspect of the appeal—an adeqate response to the panel's mistaken view of respondents' motion.*

* That many members of the legal community and public are concerned upon the FBI disclosures regardirg Judge Kaufman's conduct, and are publicly disseminating those facts in the media is their proper prerogative, but does not bear upon the issues in this petition presented to this Court. See *Meeropol, applicants* v. *Nizer et al.*, 50 L.Ed. 2d 729, Application A-543, January 18, 1977 and papers in support thereof.

It is the petitioners, not the respondents, who are seeking to inject political issues, and red herrings, in these proceedings and by their scurrilous and base attacks are attempting to prejudice the courts against the respondents. It is the petitioners who seek to obscure the substantial issues and respondents' valid claims and who resort to any tricks, deceptions, lies and groundless claims, to avoid or delay at all costs the day they must proceed to trial before a court and jury and be compelled to testify under oath.

The petitioners should not be permitted to abuse the processes of this Court and taint the record with such false, scurrilous and scandalous claims having no foundation in the files and records of the case. This portion of their petition should be stricken, and costs imposed upon petitioner's.

CONCLUSION

The petition for a writ of certiorari should be denied and pages 7 through 12 of the petition should be stricken and the petitioners be taxed with costs.

Respectfully submitted,

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